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ABSTRACT

Public broadcasting in the United States frequently draws criticism from conservatives who accuse it of pursuing an agenda promoting environmentalism, gay rights, affirmative action, reproductive choice, and other liberal causes, and of being hostile to conservative interests such as defense, the pro-life effort, and the promotion of Christian values. To date, concerns over censorship in public television have focused, not on overt efforts by Congress to determine the bounds of acceptable programs, but on not-so-subtle pressure at both the national and the local level to self-censor or risk loss of funding. Several recent cases of controversial programs have led to calls for ties between funding of the public television system and program content--programs such as "Tongues Untied," "Portrait of a Marriage," and "Tales of the City." Assessing the constitutionality of possible future efforts by Congress to place content-related conditions on the funding of public television seems to require that 3 areas of law be analyzed: (1) the current statutory framework in which the public television system operates; (2) the recent case law in the area of the First Amendment and public broadcasting; and (3) relevant overarching judicial principles. Although the Doctrine of Constitutional Conditions offers protection against congressional interference, even it may allow content of individual programs to be a factor in funding decisions--and legal scholars question the relevance of a legal principle whose genesis was in the New Deal era. (Contains 30 references.) (TB)

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If You Take the King's Shilling, You Do the King's Bidding: Funding and Censorship of Public Television Programs

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If You Take the King's Shilling, You Do the King's Bidding:

Funding and Censorship of Public Television Programs

Public broadcasting in the United States frequently draws criticism from conservatives who accuse it of pursuing an agenda promoting environmentalism, gay rights, affirmative action, reporductive choice, and other liberal causes, and of being hostile to such conservative interests as defense, marketplace regulation, the pro-life movement, and the promotion of Protestant Christian values. Occasionally, this criticism has led to pressure on the Public Broadcasting Service (PBS), the Corporation for Public Broadcasting (CPB), local public television stations, and corporate underwriters to alter or eliminate programs offensive to the values or contrary to the ideologies of a portion of the audience.

Among the recent examples was Tongues Untied, filmmaker Marlon Rigg's documentary and performance piece on being black and gay in the United States. The program drew the ire of watchdog groups around the country, who threatened to bring obscenity and indecency complaints against the stations that aired it. More recently, CPB Chairman Ervin Duggan has been accused of caving in to pressure from the Right and withdrawing funding for a sequel to the highly-successful and critically-acclaimed 1994 miniseries Tales of the City. The program, based on the book by Armistead Maupin and set in San Francisco in the late-1970s, had been condemned in some quarters for its protrayals of drug use, sexual promiscuity, homosexuality, and transgenderism.

To date, concerns over censorship in public television have focused, not on overt efforts by Congress to determine the bounds of acceptable programs, but on not-so-subtle pressure at

both the national and local level to self-censor or risk loss of funding. But given both the historic disdain by conservatives for the content of some PBS programs and current efforts by Republican leaders in Congress to reduce or eliminate federal funding to public broadcasting, the possibility exists that PBS, CPB, or local public stations might at some point be forced to accept some sort of more overt programming guidelines in exchange for either continued federal funding or, as a substitute, state government funding.

This paper addresses the ability of state or federal governments to effectively censor public television programming through conditions placed on funding. The author will review recent cases in which controversial programs led to calls for ties between funding of the public television system and the content of its programs, and explore case law concerning the First Amendment status of publicly-owned broadcasting facilities. He also will discuss the relevance of case law and legal commentary concerning the NEA controversies of the late-1980s and early-1990s. Particular attention will be given to the Doctrine of Constitutional Conditions (Tribe, 1988), a line of legal thinking that addresses the constitutional rights of those accepting federal grants. With the foregoing as a basis, he then will address the constitutionality of conditional taxpayer funding of the production and distribution of public television programs.

Controversies in Public Television Programming

Public television, perhaps best known as the home of such innocuous but highly-regarded offerings as Sesame Street, Nova, and This Old House, also has had a history of programming decisions that have not been popular with some viewers. Often, but not always, these decisions have been to air programs reflecting what critics charged was a liberal bias. Two such programs, one deadling with sex education and the other with criminal justice, led the conservative media

watchdog group Accuracy in Media to seek the help of the courts in forcing the FCC to require balanced viewpoint within all PBS programs (Accuracy in Media v. FCC, 1975). The court declined, noting that to do so would hold public television stations to a higher standard of objectivity and balance than the one to which other broadcasters would be held.

Death of a Princess

But in at least one important case from the early-1980s, public broadcasters got into trouble for not going far enough, rather than going to far. Decisions by PTV stations in Houston and the state of Alabama to not air a PBS program critical of the treatment of women in some Middle Eastern societies actually prompted charges of state government censorship and a lawsuit by viewer groups. In an important consolidated decision, the Fifth Circuit Court of Appeals ruled that while the broadcasting authorities that were licensees of the stations had engaged in self-censorship, the First Amendment rights of the audience were not implicated.

Tongues Untied, Portrait of a Marriage, and Tales of the City

In three more recent cases, public television's alleged liberal agenda was once again the focus of debate. In 1991, most PBS stations aired a program by African-American filmmaker Marlon Riggs entitled Tongues Untied. The combination documentary-performance piece was intended to provide insight into the lives and struggles of gay black men. Some two dozen public television stations, including those in Houston (Gerber, 1991) and Detroit (McWilliams, 1991) chose not to air the program (Bernstein, 1991). Those that did tended to air the program late at night to avoid running afoul of the FCC's restrictions on indecent programming. The program was widely criticized by conservative commentators. Among them was syndicated columnist James Kilpatrick, who called the show "grossly offensive" and "garbage". Because it was funded

in part by the National Endowment for the Arts, Tongues Untied also was part of congressional debate over what some charged was taxpayer funding of offensive material (Gerber, 1991).

Although its more mainstream approach tended not to attract the publicity or outcry that Tongues Untied had, PBS's 1992 miniseries Portrait of a Marriage enraged the conservative press with its portrayal of a lesbian relationship. The program was broadcast as a part of public television's Masterpiece Theatre series (Dreher, 1992).

Public television's most recent and in some ways most intriguing controversy concerned its January 1994 broadcast of a three-part miniseries, Tales of the City. Based on the book of the same name by Armistead Maupin, the series chronicled life in San Francisco in the mid-1970s and included among its themes homosexuality, transgenderism, adultery, and drug use. The series won a Peabody award, was nominated for an Emmy, and became one of the most-watched programs in PBS history (Scott, 1994). Even so, it was harshly criticized by the Reverend Donald Wildmon of the conservative American Family Association (Carman, 1994, April 4), led PBS to restructure its programming process and demote the woman responsible for scheduling it (Mifflin, 1995), and prompted the network to slash the budget of American Playhouse, which had planned to co-produce a sequel with Great Britain's Channel 4 (Scott, 1994; Carman, 1994, October 12). More importantly, together with Tongues Untied and Portrait of a Marriage, it led to threats of cuts to future funding of public television in Congress and in at least one state legislature.

The PBS funding and scheduling process

The structure of the public television system in the United States as it had emerged by the early-1970s was designed to reduce the likelihood of governmental intrusion into the

programming process. Congress established the Corporation for Public Broadcasting as a private corporation that would receive money from Congress and from private sources, and would distribute funds to program producers, to its PBS distribution system, and to stations owned by state governments, universities, private foundations, and others. The federal government was to hold no licenses itself.

Approximately 64% of all public television station programs come from the Public Broadcasting Service, the government-supported distribution system. Other sources include local public television stations, regional public television networks, instructional television program suppliers, and commercial syndicators. Beginning in 1991, PBS programming executives were given a fairly fee hand in selecting programs for funding and distribution, though they were answerable to the National Program Service (NPS) Advisory Council, an elected board of station program executives (Fuller, 1993).

In 1994, in the wake of the criticism for the airing of Tongues Untied, Portrait of a Marriage, and Tales of the City, newly-appointed PBS president Ervin Duggan restructured the process to diminish the role of the NPS in favor of the newly-created PBS Syndication Services. The change was seen by some Duggan critics as retaliation against the NPS and its head, Jennifer Lawson, who had approved the scheduling of the three shows (Rich, 1994).

Some programs require PBS funding grants to complete production; some end up being funded entirely by corporate underwriters. A few programs may actually be purchased by PBS, but usually only those previously aired by broadcasters in another country (Christensen & Robertson, 1993). Internal funding for PBS-distributed programs comes from the Program

Assessment Fund (PAF). Public television stations pay an annual fee to the PAF proportionate to their market size (Fuller, 1993).

A significant but ever-decreasing share of the money to fund the public television system comes from Congress in the form of annual appropriations to CPB. To date, the shrinking federal dollars have been made up for through increases in corporate underwriting of programming, viewer memberships, and a variety of creative revenue-generating sources, such as merchandising and leasing of facilities. A number of conservatives in Congress are known to favor totally cutting the funding to public television and radio, and they came perilously close during the most recent set of budget hearings. Few in public broadcasting are optimistic about the future of federal funding. But until it is eliminated, budget and appropriations hearings provide congressional critics of public broadcasting with an opportunity to voice their dissatifaction with the system.

Reaction to controversial programs

As has been noted, conservatives in Congress have a tradition of complaining about the perceived liberal bias in public television programs (Wharton, 1994). Frequently they have been joined by a phalanx of citizen's groups and think tanks, including the American Family Association, Accuracy in Media, the Heritage Foundation, and the little-known Committee on Media Integrity. Those complaints intensified following the broadcast of Tongues Untied, Portrait of a Marriage, and Tales of the City.

Among those particularly vocal in their criticism have been Senators Jesse Helms [R-NC] and Robert Dole [R-KS] (Holbert, 1992), and Representative Larry Pressler [R-SD] (McAvoy, 1994), all of whom took on important leadership roles on Capitol Hill with the 1994 elections. In

1992, Helms and Dole attempted to amend the bill funding public television to require social and political balance in PBS's program schedule in the wake of the Tongues Untied broadcast (Kelly, 1992). Three years later, they were joined by an anonymous group of senators who attempted to block $1.1 billion in funding for CPB, PBS, and National Public Radio (NPR) as punishment for allegedly liberal programming, including NPR's revelation of sexual harrassment charges against Clarence Thomas after he was nominated to the U.S. Supreme Court. According to one Democratic senator, the group also was still angry over the Tongues Untied broadcast (Gay, 1995). During the hearings, Pressler singled out Tales of the City as being a program that was in opposition to the values held by most Americans (McAvoy, 1994).

While negative reaction from lawmakers in Washington, D.C. received the most attention, it was in state legislatures such as the one in Georgia where PBS critics were able to make their dissatisfaction more tangible. Anger over the broadcast of Tales of the City was the principal reason given for lawmakers' axing a $20 million capital project for Georgia Public Television (Foskett, 1994).

Controversies at the National Endowment for the Arts

Advocates of public television had good reason to be concerned Congress and state legislatures might condition future funding on the adoption of program standards that would effectively have kept programs such as Tongues Untied, Portrait of a Marriage, and Tales of the City off public television stations. Just five years before, a Congress concerned over the funding by the National Endowment for the Arts (NEA) of works some found offensive[1] amended the NEA's grants procedure to prohibit the funding of obscene works,[2] including those featuring homoeroticism, sadomasochism, and sexual acts involving children.

In two separate lawsuits challenging the new funding guidelines (Bella Lewitzky Dance Foundation v. Frohnmayer, et. al., 1991; Finley, et. al. v. National Endowment for the Arts, 1992), federal judges found the restrictions to be unconstitutionally vague. In finding against the NEA's new procedures, the Finley judge noted that vague terms such as "homoerotic" and "sadomasochistic" were offensive to the First Amendment rights of the grant applicants because they might compel them to "'steer far wider of the lawful zone...than if the boundary of the forbidden zone were clearly marked.'" The district judge writing the Bella Lewitzky decision further noted the importance of the NEA "imprimateur" in obtaining supplementary grants from other sources.

Regrettably, because of the vagueness and imprecision of the language in the NEA's funding guidelines, the judges in both cases left largely unanswered the larger constitutional question of whether a more finely-honed content-based restriction than the one employed by the NEA could be used as a basis to deny taxpayer funding to either works of art or television programs. It is the latter part of the question to which the author now addresses himself.

Discussion

Assessing the constitutionality of possible future efforts by Congress to place content-related conditions on the funding of public television seems to require three areas of law be analyzed: the current statutory framework in which the public television system in the United States operates, recent case law in the area of the First Amendment and public broadcasting, and relevant overarching judicial principles.

Statutory prohibitions

When Congress set up the current public broadcasting system in the early-1970s, it intended the system would be, to whatever extent possible, insulated from political pressures even though it would be deriving a large part of its facilities and operating money from the federal government. Thus, officials of the federal government are prohibited from "...exert[ing] any direction, supervision, or control over public broadcasting." (Public Broadcasting Act, 1988). This would appear to preclude any legislative changes to the funding mechanism for the CPB that would have the net effect of altering the operation or programming of PBS or individual public stations. In fact, it would appear to leave the public broadcasting system in the hands of employees of the independent Corporation for Public Broadcasting, PBS, and member stations.

It is important to remember, however, that since this is a statutory prohibiition, it is subject to alteration by Congress, and could be amended out of existence to allow for greater legislative say in the nature of how public television programs are funded or in how the program development, production, funding, and distribution process would be conducted. In fact, only the good faith of Congress to rail against the system from the floor of the chambers but to not legislatively clear the way for their involvement has kept public TV from greater external control. Should Congress decide to abandon this tradition, the only recourse for those opposing government interference with PBS programming would be through the courts, which thus far have been reluctant to find a constitutional issue in government influence over public broadcasting.

Implications of Muir v. AETC and FCC v. League of Women Voters

Built into the original Public Broadcasting Act of 1967 that established the Corporation for Public Broadcasting was a prohibition on editorializing by stations seeking CPB funding. The stated rationale by Congress for this ban was to protect the system from retaliation by senators and members of congress unhappy with individual station viewpoints. The ban eventually was successfully challenged in FCC v. League of Women Voters (1984). Writing for the majority, Justice William Brennan carefully avoided delineating the extent to which federally-funded broadcasters were insulated by the First Amendment:

> We do not hold that the Congress or the FCC are without power to regulate the content, timing, or character of speech by noncommercial educational broadcasting stations. Rather, we hold only the specific interests sought to be advanced by [the] ban on editorializing are either not sufficiently substantial or are not served in a sufficiently limited manner to justify the substantial abridgement of important journalistic freedoms which the First Amendment jealously protects (FCC v. League of Women Voters, 1984).

The question put before the court in the cases comprising the Muir appeal was whether or not state government-supported public television stations or systems had the authority to make programming decisions for political reasons. In both cases under review, the states had decided not to air a programming critical of middle eastern societies for fear doing so might threaten the lives of American citizens working in those countries, as well as damaging international trade between those countries and regional businesses. The court, after concluding the television stations involved did not meet the definition of public forums, further found that First

Amendment interests were not involved, since the governments were not interferring with the expression of private individuals:

> The government is not restrained by the Frist Amendment from controlling its own expression..."[t]he purpose of the First Amendment is to protect private expression and nothing in the guarantee precludes the government from controlling its own expression or that of its agents." (Muir v. Alabama Educational Television Commission, 1982).

The court continued that state-owned stations are not analogous to public libraries, where space for acquisitions is less an issue. Since broadcast schedules are limited both by the hours of the day and by the potential audience available at a given time of day, stations have an inevitable editing function, and politically-motivated choices likewise are inevitable.

The critical distinction between the Muir case and any attempts by Congress to influence the broad system of public television in this country is that, while the State of Alabama and the publicly-funded University of Houston owned their stations, the federal government itself owns no conventional broadcast properties and in fact is precluded by law from doing so. Neither does it own either PBS or CPB, which are both private, not-for-profit entities. The editing function in this case is not performed by federal employees, but rather by employees of private organizations or state and local governments.

In fact, the hypothetical at the center of this paper is more analogous to federal funding of a not-for-profit service provider, such as health clinic. In Rust v. Sullivan (1991), the U.S. Supreme Court conceded that, while there is no constitutional right to advocate abortion at a public clinic, neither is the government free to control the speech of such clinics:

> Funding by the government, even when coupled with the freedom of the fund recipients to speak outside the scope of the government-funded project, is [not] invariably sufficient to justify government control over the content of expression (p.1776).

The Court thus alludes to the so-called Doctrine of Constitutional Conditions, a legal principle that generally governs situations in which the state funds speech. Examination of this precept may yield the best prediction of the constitutionality of government restrictions on the content of public television

Doctrine of Constitutional Conditions

The Doctrine of Constitutional Conditions, alternatively known as the Unconstitutional Conditions Doctrine or the Doctrine of Conditional Consent, is a decades-old principle in First Amendment law that maintains the government may make funding of projects conditional upon recipients espousing a particular viewpoint. Or, as the U.S. Supreme Court has put it,

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially, his interest in freedom of speech (Perry v. Sindermann, 1972).

Though it began to emerge in the New Deal Era of the 1930s and 1940s (Sunstein, 1990), the doctrine appears to have its roots in the writings of 17th century Egnlish philosopher John Locke, who believed governments were created when people surrendered some of their absolute

freedom in exchange for the order and security governments could provide. But Locke maintained such "social contracts" should never require surrender of what he termed "natural rights", such as the freedom of speech (Carter, Franklin, & Wright, 1993).

While at first blush the doctrine might appear to extend broad First Amendment protection to those applying to federal grant programs, it is in reality a narrowly tailored proscription of governmental power. For instance, as the Court noted in its 1991 decision in Rust v. Sullivan, the government creates an unconstitutional condition when it

> ...places a condition on the recipient of the subsidy rather than on the particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside of the scope of the federally funded program (p. 1774).

Thus, though it appears CPB could be compelled by law to review the content of a program producers had submitted for funding, it could not fund based on an applicant's agreeing to abide by a set of vague content strictures. This would be particularly true in the ever-increasing number of cases in which CPB funds a part of the production, and its support acts as a magnet for other funding sources.

In recent years, the doctrine has come under increasing criticism from legal scholars, some of whom maintain it has become an anachronism. Sunstein (1990) believes the doctrine no longer to be viable because its development did not anticipate the dramatic growth of the modern welfare state. With the government attempting to fund a wide variety of projects with limited resources, she argues, generality is inconceivable and selectivity based on subject matter is inevitable.

Cole (1992) likewise finds flaws in the doctrine, but believes the better alternative to its abandonment is to reformulate it along the lines of what he refers to as a "spheres of neutrality" approach. Under this approach, the government would be obligated to continue to fund non-selectively a narrower range of activities than is embraced by the current doctrine, because of their influence in shaping public debate. Among these would be traditional public forums, public universities, and public broadcasting:

> The impetus behind public broadcasting...was not to provide a medium for government propaganda, but to provide an alternative to the commercial media which would amplify voices not heard in the private market-place. If one of the reasons we value government funding is its ability to counter private economic domination of the marketplace of ideas, we cannot insist on absolute neutrality. Thus, the neutrality mandate must recognize an exception for government-funded speech designed to provide opportunities for otherwise unheard voices (Cole, 1992).

Presumably, therefore, Congress would be precluded from mandating a certain type of balance in the content of public radio and television, or otherwise conditioning federal funding on adherence to a particular type of content prescription, unless that prescription were for unpopular or underrepresented viewpoints.

Conclusions

The constitutional status of a future attempt by Congress to impose content-related restrictions on federally-funded public television programs thus is uncertain. Public broadcasting remains an unpopular recipient of federal funding in the eyes of the current Republican

leadership in Congress, though congressional opponents of PBS and NPR appear to lack the political clout to completely cut federal funding to public radio and television. Their fallback position may well be to continue to fund the system, but at increasingly reduced levels. To the extent public television opponents are able to identify individual narrow appeal programs that do not reflect mainstream values or imagery, they may be able to rally sufficient support to amend existing legislation to permit funding conditioned on certain content standards. The current statutory prohibition on intrusion by federal officials into the operation or programming of public broadcasting is subject to the whims of lawmakers and could easily be swept away.

Likewise, existing case law does not appear to permit the courts to prohibit such intrusion. Both Muir v. Alabama Educational Television Commission (1982) and Rust v. Sullivan (1991) allowed state and federal governments, respectively, to determine the content of taxpayer-funded speech, although the circumstances in both cases differ in some important ways from those that would be present in content-based restrictions on public television programs.

The Doctrine of Constitutional Conditions seems to offer some protection against congressional interference, but even it may allow content of individual programs to be a factor in funding decisions. Moreover, legal scholars have begun to question the continuing relevance of a legal principle whose genesis was in the New Deal Era and which pre-dated both the public broadcasting system as currently constituted and the broadly diverging views of what constitutes acceptable subject matter for artwork or programming.

Ironically, the only sure long-term protection against congressional efforts to impose content conditions on the funding of public television and radio programs is what advocates of PBS and NPR fear: the elimination of ongoing federal funding of CPB operations. If federal

funding decreases were made over a sufficient number of years or if the current system of annual budget appropriations were replaced with a trust fund, the King's shilling would remain in his purse, unable to influence his subjects.

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Author Notes

[1]Among the works specifically cited in hearings on NEA's budget were Andres Serrano's "Piss Christ", a photograph depicting a crucifix submerged in a glass container of urine, and an exhibition of the works of the late photographer Robert Mapplethorpe, some of which contained depictions of homoeroticism and sadomasochistic sex.

[2]Cincinnati's Contemporary Art Center, which hosted the Mapplethorpe exhibit, was charged by local authorities with obscenity, but subsequently acquitted in a jury trial.